

No. 10,809

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LAWRENCE W. BRADY,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from the judgment of conviction (Tr. 17-18) of the District Court of the United States for the Northern District of California, Southern Division, convicting the appellant, after a jury trial, of a violation of the Jones-Miller Act (21 U.S.C. 174). The indictment, in two counts, alleged that he received, concealed and facilitated the concealment and transportation of narcotics, to-wit, heroin, which is a derivative and preparation of morphine (Tr. 2-3).

The Court below had jurisdiction under the provisions of Title 28, United States Code, Section 41, sub-division 2. The jurisdiction of this Honorable Court is invoked under the provisions of Title 28 United States Code, Section 225, subdivision (a) and subdivision (d).

STATEMENT OF THE CASE.

Appellant's statement of the case is incomplete and does not present to the Court an adequate picture of the facts upon which the conviction is based. Therefore, we make the statement which follows.

STATEMENT OF FACTS.

The arresting officers first met the defendants, Mr. and Mrs. Brady, in the Sir Francis Drake Hotel in San Francisco in January, 1943. At that time, one of the officers had a conversation with the defendants concerning their possession of narcotics and their room was searched but no narcotics were found. Both of the defendants (one of whom is the appellant herein) were acquainted with the officers and knew that they were Agents of the Federal Bureau of Narcotics (Tr. 39; 66; 132; 153).

On April 4, 1944, the Agents saw the appellant drive his Cadillac automobile into a public garage at 840 Sutter Street, San Francisco, California, at about six o'clock in the evening. He left the garage and entered the Commodore Hotel, which is located across the street from the garage where he resided. About fifteen minutes later he came out of the hotel, accompanied by his wife, reentered the garage and drove out in his automobile.

The Agents followed his car in their automobile to the corner of Van Ness Avenue and Lombard Streets, where Mrs. Brady left the car and remained standing on the street corner for about five minutes. She did

not meet or talk to anyone during this period. He drove his car several blocks further down on Van Ness Avenue, and out of sight of the Agents, who had remained to observe the activities of Mrs. Brady. He returned in about five minutes. His wife reentered the automobile and he drove back to the same public garage on Sutter Street, followed by the Agents. The Agents had his car under constant observation at all times on its trip from the garage to Van Ness Avenue and Lombard Streets and on its return trip to the garage; the appellant and his wife did not meet or talk to anyone else during this time. Neither the appellant nor his automobile was under the observation of the Agents during the five minute interval which elapsed when he drove away from Van Ness Avenue and Lombard Street and returned to pick up his wife (Tr. 39-40; 45-46; 65-67; 76-77; 96-97).

When the appellant arrived at the garage in his automobile he made a left hand turn and entered the premises. The Agents followed immediately in their car. The Agents' car was paused at the curb facing into the garage at the time his car stopped about seventy feet inside the building. The Agents drove in and stopped about ten feet to the rear of his car in the same lane, which was the main runway of the garage. From their position at the curb, while driving into the garage and after they had stopped, the Agents could observe his car at all times (Tr. 40; 66-67).

When the Agents' car paused at the curb, they saw the appellant's car stop and saw Mrs. Brady get out

of the front right hand door. While the Agents' car was proceeding into the garage, Mrs. Brady walked towards it on the right hand side; as she passed the car she looked into it and continued walking. In this connection Agent William H. Grady testified: "As Mrs. Brady passed my car she looked at me directly in the eyes. She did not make any signs or gestures of any kind, but her expression changed considerably" (Tr. 59). When she reached a point opposite the right rear wheel of the Agents' car she stopped. By this time their car had come to a stop and the Agents had gotten out. Agent William H. Grady had Mrs. Brady under observation at all times after she had left appellant's automobile and was walking toward the entrance to the garage. When Agent Grady got out of his car Mrs. Brady was standing with her back toward him at a point opposite the right rear wheel of the Agents' car. It was at this point that he saw a package drop, apparently from the folds of her clothing, in a straight line to the floor, where it came to rest at a point approximately four to six inches from her feet (Tr. 40-41; 53-64).

Agent Grady testified: "When I got out of the car her back was toward me. I observed a package drop from the folds of her clothing to the cement floor in the garage. When I first observed the package it was in the process of falling."

"Q. About what distance was it from her body in relation to the package falling?

A. Well, it was as though it had fallen directly from the folds of her coat; I would say about six inches from her body, from her legs as it fell.

Q. Was it falling in a straight line or in an arc?

A. In a straight line.

Q. Falling down in a straight line?

A. Yes sir."

(Tr. 40-41.)

Agent James Ferguson corroborated this testimony (Tr. 97).

Agent Grady picked up the package and found it to be a brown envelope about two inches wide and about four and one-half inches long. It had two pieces of Kleenex-like material around it. He immediately opened it and examined the contents, which from his experience as a narcotics officer he believed to be heroin (Tr. 41). He asked Mrs. Brady what was in the package and where she had gotten it and she denied knowing anything about it. He then called out to the other Agents, "I have it", and placed Mrs. Brady under arrest (Tr. 42).

While Agent Grady was thus engaged Agents McGuire and Ferguson, who had left their car at the same time as Agent Grady, walked to the rear of the garage to a point near the vicinity of the hood of appellant's car where he was standing. These Agents had seen both Mr. and Mrs. Brady leave their car and Mrs. Brady walk toward the Agent's car (Tr. 68; 97-98). Agent McGuire had just about reached the appellant when he heard Agent Grady call out "I have it", whereupon he went up to the appellant and placed him under arrest. The appellant made some remarks and a threatening gesture and was hand-

cuffed by the Agents. Agent Ferguson had joined Agent McGuire within a few moments. The Agents walked back with the appellant to where Agent Grady and Mrs. Brady were standing and Agent McGuire asked Mrs. Brady if she had seen the narcotics, which she denied. He then told the appellant that he was under arrest for transporting narcotics as Agent Grady had seen Mrs. Brady drop the package (Tr. 68-69; 96-106).

He was then taken to his room in the Commodore Hotel across the street. The room and the appellant were searched, but no narcotics were found (Tr. 69). Agent McGuire testified that he had a conversation with the appellant in the hotel room in which he admitted having possession of the narcotics, stating that he had paid \$300.00 for it. He further offered to "make a deal" with the Agent by disclosing the name of the man from whom he had purchased the narcotics if this would help him.

Agent McGuire stated that the appellant said:

"This stuff isn't worth \$50.00 an ounce, and they are holding me up and robbing me of all the money I can put my hands on. What can I get out of the deal if I give you the man's name? What can I do to help myself in this proposition?" (Tr. 70).

He was informed by Agent McGuire that the only person who had the authority to consider this offer was the District Supervisor of the Federal Bureau of Narcotics at San Francisco, Mr. Joseph A. Manning. He requested that he be taken to Mr. Manning so that he could talk to him. Agent McGuire attempted to

communicate with Mr. Manning by telephone from the hotel room but was unable to locate him. This was some time between seven and eight o'clock in the evening as the arrest in the garage took place at approximately 6:45 o'clock P.M. The appellant and the Agents then went to the office of the Federal Bureau of Narcotics at 68 Post Street, San Francisco, where they waited for Mr. Manning, who came in about 11:30 o'clock in the evening (Tr. 70). During this interval the appellant, his wife and the Agents went out to dinner (Tr. 144).

Mr. Manning questioned the appellant and related the following:

"Agent McGuire had handed me a package, an envelope containing heroin. It was lying on my desk. Brady was across the desk from me. I asked him where he got this heroin. He said he got it from a fellow on Van Ness Avenue, and that he paid \$300 for it; that he had spent large amounts of money in making purchases of heroin, and that it was badly adulterated. He called it 'flea powder.' He told me his wife accompanied him to Van Ness Avenue and Lombard; that she left the car at that point; that he drove on three or four blocks where he met the man from whom he obtained the heroin. Brady then made the proposition to me that if I would turn him loose and wife loose and release the car, that he would help me catch other peddlers of narcotic drugs, peddlers more important than I knew about. I told him I could not very well accept such a proposition as that. I told him if he would help me catch these peddlers I would inform the United States Attorney of that fact, and the United States

Attorney would doubtless make such fact known to the Court, and that a lighter sentence in the case would be given him. He would not agree. He said if he or his wife went to jail and he lost his car he would 'just as soon go all the way as get just, say, a small sentence'. I told him that I didn't have the power to turn him loose under the circumstances. I then questioned Mrs. Brady separately under the same circumstances, the same time and place, and with the other agents out of the room."

(Tr. 107-108.)

The appellant was then placed in the City Prison to await his arraignment on the following day before the United States Commissioner (Tr. 75).

Both the appellant and his wife testified. He claimed that he drove out to Van Ness Avenue and Lombard Street with his wife so that she could look at an apartment; that he let her out of the car and proceeded down Van Ness Avenue to find a place to have the hood of his car fixed (Tr. 132-134). When he returned to the garage he was in the act of attempting to fix the hood himself when the Agents stepped up and placed him under arrest (Tr. 134-135; 80-81). He denied that he had admitted possession, purchase or ownership of the narcotics (Tr. 138; 139; 141-142; 144-145).

The appellant denied that he was a narcotic addict or that he had ever used narcotics. In this connection he testified (in relating a conversation purportedly had with Agent McGuire): "Somebody has convinced

you I am a narcotic user. No matter what I can do I can't prove to you, or convince you, I am not a user, that I have nothing to do with narcotics * * *” (Tr. 139). He further testified: “* * * I have nothing to do with narcotics” (Tr. 139). “I wouldn't know where to turn to buy narcotics. I do not know any big shots. I do not know any narcotic peddlers. I do not know where I could get narcotics” (Tr. 141). “I never purchased narcotics. I didn't see narcotics. I never used any narcotics” (Tr. 141). “I am not a user of narcotics. I do not use narcotics in any way, shape or form. I never have and I hope I never will” (Tr. 142).

On *cross-examination* the appellant testified: “I have nothing to do with narcotics or peddlers * * * I do not associate with addicts. If people are addicts I will say I don't know it. If I know they are addicts I deliberately stay away from them, because I don't care anymore about narcotics or dope than the average citizen does. I hate them just as bad; * * *” (Tr. 146).

And further:

“I am not a narcotic addict, nor have I ever been” (Tr. 146).

He denied that he had ever undergone treatment for the narcotic habit. On *cross-examination* he testified:

“I have never undergone treatment for the cure of the narcotic habit. On April 6th of this year I was admitted to the Patterson Sanitarium in San Leandro under the name of W. L. Bald-

win, for a nervous breakdown. My wife was admitted with me, under the name of Alice Baldwin. She had a side ailment. We both went over there for a rest cure. If you will look at the books you will see it. We were both admitted for a nervous breakdown. That was right after the arrest, and I was so ashamed and so disgraced that I didn't even want to see myself. While my wife and I were in the Patterson Sanitarium, to my knowledge, we did not receive any narcotics administered to us. I entered that sanitarium on April 6th and left on April 11th. My wife was there from April 6th until April 16th. She had side trouble."

(Tr. 146.)

On *redirect examination* he testified:

"We entered the Patterson Sanitarium under the name of Baldwin simply because we were both so ashamed and disgraced over this narcotic charge. I didn't want to see my friends. I wanted to get away. My wife had a side trouble. I don't know just what it was, the doctor there didn't seem to know, but it was giving considerable (134) trouble. When we entered the hospital we signed as entering for a rest cure. That was a day or so after the arrest on this charge."

(Tr. 147.)

Irving Cowan, produced as a witness by appellant, testified that he was at the time of the trial of this case serving a one-year sentence imposed by the State of California as a result of having been convicted of the possession of heroin (Tr. 116). That he had known the appellant for three or four years and was at one

time employed by him (Tr. 116-117). That on the day in question he was standing outside the garage and saw the two cars drive in, that at that moment he saw a man, known to him as Frenchy, from whom he had previously bought narcotics, toss a white package into the garage from the ramp. That he called out to this man to wait but that he drove off in an automobile (Tr. 123-124).

On *cross-examination* he testified that he did not see where the package landed in the garage, and, although he saw Agent Grady pick up something from the floor a few minutes later, he did not know that what Agent Grady picked up was the package he had seen thrown.

Hess Moskowitz, called as a witness by appellant, testified that he, too, had been outside the garage when the Agent's car entered. That he saw Agent Grady pick up something from the floor. That at that time he did not know the appellant but had met him once at the race track prior to the trial, at which time the appellant asked him to testify (Tr. 150-151).

On *cross-examination* he testified as follows:

"As I walked past the garage and saw the green coupe drive into the garage and saw Mr. Grady jump out of the car and grab Mrs. Brady's arm, that is all that I remember seeing right at the time. Later on I saw other people around the front of the garage, five or six people. At the time the car drove into the garage and Grady jumped out and grabbed the woman, Mrs. Brady,

I did not see anybody in that vicinity other than Grady and Mrs. Brady. I do not know Mr. Cowan nor do I know a man by the name of Frenchy, I didn't see anybody there."

(Tr. 152.)

In rebuttal, the Government introduced the testimony of Francis Kearney, M.D. (Tr. 161-173) and Ellen Jones, R.N. (Tr. 174-178).

On *direct examination* Dr. Kearney testified that he is a licensed physician and surgeon in the State of California with his offices located in Hayward, California. That in the course of his practice he has occasion to treat patients in the Patterson Sanitarium in San Leandro. That he is familiar with the diagnosis of drug addiction, and also with the treatment for drug addiction. On April 6, 1944 (two days after appellant's arrest on the instant charge), he was called to the Patterson Sanitarium to treat a Mr. Baldwin, whom the witness identified as Mr. Brady, the appellant (Tr. 161). That at that time he diagnosed his case as narcotic addiction and prescribed a treatment for narcotic addiction which he described (Tr. 162).

On *cross-examination* the witness testified that he knew why the appellant was in the hospital but did not have any record with him. Counsel for appellant requested the record and counsel for the Government reopened the direct examination and introduced Government's Exhibits Nos. 2 and 4 (Tr. 162-167). Government's Exhibit No. 2 was a card entitled

"Report to Division of Narcotic Enforcement, 156 State Building, Civic Center, San Francisco" (Tr. 164). Government's Exhibit No. 4 was a similar card (Tr. 166-167).

The witness testified that it is a law of the State of California that a doctor who prescribes narcotics must file with the Division of Narcotics Enforcement a record of the fact that he is treating an addict and that he has prescribed certain treatment. The witness testified that Government's Exhibits Nos. 2 and 4 were the records which applied to the appellant under the name of Baldwin and that he had forwarded Exhibit No. 4 to the State authorities when the appellant left the hospital.

Again on *cross-examination* the witness testified that he had examined the appellant on the first day that he saw him at the Sanitarium. That he had never seen him before and that he had not been his patient previously, although he recalled that either the appellant or his friends had communicated with him prior to the appellant's admission to the hospital requesting that he make an examination. That he based his opinion that the appellant was a narcotic addict on his admission that he had used heroin intravenously for some time, on his examination and on the appellant's clinical record (Tr. 168-170).

Ellen Jones testified that she is a trained nurse employed at Patterson Sanitarium in San Leandro where she is the Superintendent of Nurses. That on April 6, 1944 the appellant was admitted to the Sani-

tarium under the name of Baldwin. That she supervised the medication prescribed by the doctors. That the appellant was being treated for drug addiction; that she administered some of the treatment herself, which consisted of injections of morphine and that she had the records of the hospital pertaining to the appellant in her possession (Tr. 174-175). She introduced in evidence Government's Exhibit No. 5, the admittance card of the appellant (Tr. 175), and Government's Exhibit No. 6, the appellant's clinical record, commonly called the "chart".

Agent Thomas E. McGuire testified that on the day of the arrest he was outside the Commodore Hotel from approximately one o'clock in the afternoon until he followed the appellant in his automobile, except for a short interval when he followed Mr. Cowan. That about three o'clock in the afternoon he saw the witness Cowan leave the hotel and followed him to either Eddy Street or Turk Street and Mason Street. That he returned to his position outside the Commodore Hotel and remained there until the appellant drove out in his car and that he did not see Mr. Cowan return to the hotel (Tr. 178-179).

In surrebuttal the appellant testified as follows:

"I was in the hospital approximately three days before the doctor came. I did not send for the doctor, and I don't know who did. I never saw the man before he showed up that night. I never asked the doctor for anything but a sleeping pill, which he gave me and which I took with water, and he gave me another brown pill and

treated me for nerves. I never asked him for anything. I never knew what I was getting in the way of medicine and nobody explained it to me. Different nurses gave me the medicine. I saw the doctor only the one time he came to examine my wife. I never told the doctor that my wife and I were addicted to drugs. He was not sent for for that. He was sent for to relieve my wife of excruciating pain in her side. If he administered any drugs he did it of his own accord. When I entered the hospital I did not tell them that I was an addict or that I was there for addiction treatment. I told them that my wife had an extremely bad case of nerves, and I also had had nerves. It was emphatically understood that I was to leave as soon as my wife was better. I stayed three or four days."

(Tr. 181-182.)

On *cross-examination* he testified that he did not receive any injection by the use of a hypodermic needle intravenously while in the Sanitarium.

QUESTIONS ON APPEAL.

Appellant relies upon the following alleged errors:

I. Insufficiency of the evidence to sustain the verdict.

II. The arrest and subsequent seizure were illegal.

III. Documentary and oral evidence of hospitalization and treatment of appellant was admitted in error.

IV. Extra-judicial statements and admissions of appellant were admitted in error.

These points will be answered in order.

ARGUMENT.

I. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE VERDICT.

The appellant made two full and complete confessions in which he admitted his guilt and described in detail the manner in which he committed the crime with which he was charged.

These confessions, coupled with the circumstantial evidence adduced by the Agents, which corroborated in every detail the narration of events given in the confessions, were more than ample to support the verdict.

A deliberate, voluntary confession of guilt is among the most effectual proofs in the law and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession.

“A confession, if freely and voluntarily made, is evidence of the most satisfactory character. Such a confession, said Eyre, C.B. 1 Leach, 263 ‘is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and, therefore, it is admitted as proof of the crime to which it refers’.”

Hopt v. Utah, 110 U.S. 574, 584; reaffirmed in *Sparf v. United States*, 156 U.S. 51, 55.

See also:

Anderson v. United States, 124 F.(2d) 58 (Reversed on other grounds in 318 U.S. 350, 63 S. Ct. 599, 87 L.Ed.....);

Rosenfeld v. United States, 202 F. 469.

The appellant was charged with concealing and facilitating the concealment and transportation of narcotics. He confessed that he had purchased, possessed and transported the narcotics and the Agents observed him at the times and places which he described.

The Statute under which he was indicted, 21 U.S.C. Section 174, provides, in part:

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Appellant's argument that the evidence is insufficient, together with his citation of general principles of law on the subject, is convincing only if we disregard the confessions. Granting the confessions, the evidence is conclusive; and the confessions must be accepted provided they were freely and voluntarily made, were corroborated and the jury was properly instructed. (These points will be discussed, *infra*, in Section IV.

U.S. is in effect admitting that it stands or falls on the confessions

II. THE ARREST AND SUBSEQUENT SEIZURE WERE LEGAL.

(a) The Arrest Was Legal.

The appellant's Motion to Quash Arrest was properly denied.

A felony was committed in the presence of the Agents when the appellant's wife threw, or dropped, the package containing the narcotics to the floor of the garage. Agent Grady testified that from his experience as a Narcotic Agent he believed the package contained narcotics; this belief was strengthened by his knowledge that she knew him to be a Narcotic Agent, that her expression changed when she saw him in the automobile and that immediately thereafter she attempted to dispose of the package by throwing it to the floor. It is common knowledge that narcotic violators attempt to dispose of the contraband upon apprehension.

Having positive proof that the appellant's wife had been in possession of narcotics just a few seconds after she left the automobile driven by the appellant, that she tried to dispose of them when she recognized the Agents, that she had, to the Agents' own knowledge, been riding with the appellant in his automobile just prior thereto, that she had waited on a street corner for no apparent reason while the appellant drove off and returned, certainly gave the Agents probable cause to believe, as reasonable and prudent officers, that the appellant was guilty of concealing and facilitating the transportation of the narcotics or had, at least, aided and abetted his wife in so doing.

In discussing probable cause, the Supreme Court in *Carroll v. United States*, 267 U.S. 132, 161, 45 S.Ct. 280, 69 L. Ed. 543, 3 ALR 790,

said:

“If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient.”

See also:

Papani v. United States (CCA-9), 84 F.(2d) 160;

Rocchia v. United States (CCA-9), 78 F.(2d) 966;

Poldo v. United States (CCA-9), 55 F.(2d) 866;

Mattus v. United States (CCA-9), 11 F.(2d) 503;

United States v. Bell (D.C. Cal.), 48 F. Supp. 986.

N.B. We respectfully call the Court's attention to the fact that, contrary to the statement made in appellant's brief, the evidence clearly shows that the appellant was arrested *after* Agent Grady had recovered and opened the package, determined to his satisfaction that it contained narcotics and called out "I have it" (Tr. 68).

(b) Appellant Cannot Complain of Illegal Search and Seizure.

The right to complain because of an illegal search and seizure is a privilege personal to the wronged or injured party and is not available to anyone else.

The evidence introduced at the trial was not seized from the person of the appellant nor from premises owned by him or to which he had the right of possession. On the contrary, it was picked up from the floor of a public garage where it had been thrown or dropped by the appellant's wife. Furthermore, the appellant disclaimed ownership of the property which was seized.

It is obvious that he cannot complain of an illegal search and seizure.

Ingram v. United States (CCA-9), 113 F.(2d) 966;

McDaniel v. United States, 294 F. 769, certiorari denied 264 U.S. 593, 44 S.Ct. 453, 68 L. Ed. 866.

III. EVIDENCE OF APPELLANT'S HOSPITALIZATION AND TREATMENT WAS PROPERLY ADMITTED.

The appellant, on direct examination, emphatically stated that he was not a narcotic addict, that he had never seen, purchased or used narcotics, that he did not know any narcotic peddlers, that he wouldn't know where to buy narcotics, that he had "nothing to do with narcotics".

While proof of his narcotic addiction would not be relevant as proof of his guilt of the crime charged and could not be offered in the Government's case in chief, by his own testimony he "opened the door" to cross-examination and rebuttal on this point.

A party who first introduces evidence which is irrelevant to the issues cannot assign error on the admission of evidence from the adverse party relating to the same matter.

Warren Live Stock Co. v. Farr, 142 F. 116, 73 OCA 340.

If evidence not strictly admissible is introduced by one party, and not withdrawn, the other party may cross-examine as to such evidence and offer evidence in rebuttal thereof.

Watts v. Southern Bell Telephone & Telegraph Co., 66 F. 453, affirmed in *Southern Bell Telephone & Telegraph Co. v. Watts*, 66 F. 460, 13 CCA 579.

Furthermore, even proof of distinct offenses is allowed to rebut an inference of mistake, want of guilty knowledge, wrongful purpose, or innocent intent. (In the instant case the cross-examination and rebuttal did not prove a distinct offense as narcotic addiction is not a violation of Federal law.)

De Four v. United States (CCA-9), 260 F. 596, certiorari denied 253 U.S. 487.

In the latter case the defendant, on trial for maintaining a house of ill fame, testified that she did not know of any practice of prostitution in the building and did not receive the impression that such was the case from certain incidents which occurred in her presence. It was held not to be error to admit evidence that she had previously conducted houses of ill fame.

Certainly, the only purpose of appellant's vociferous attempt to dissociate himself from any connection with narcotics or narcotic addicts was to create in the minds of the jury the inference that a person of such impeccable behavior in this regard could not be guilty of the crime of possessing narcotics and to support his contention that he had been "framed" by the Agents.

We respectfully submit that the interests of justice and its fair administration demand that the Government be permitted to rebut this type of self-serving testimony by a defendant.

See also:

Shepard v. United States, 290 U.S. 96, 54 S.Ct. 22, 78 L. Ed. 196,

and

Haffa v. United States, 36 F. (2d) 1, certiorari denied 281 U.S. 727, 50 S.Ct. 240, 74 L. Ed. 1114;

where it was held that testimony that defendant had admitted bribing prohibition agents was admissible to rebut his testimony that he had never engaged in the liquor business.

Furthermore, the cross-examination and rebuttal was properly allowed for the purpose of testing the credibility of the witness.

The right to permit cross-examination for this purpose is discretionary with the Court.

United States v. Ball, 163 U.S. 662, 16 S.Ct. 1192, 41 L. Ed. 300.

In *Mahoney v. United States*, 26 F. (2d) 902, the Court said:

“Undoubtedly a person accused of crime, who offers himself as a witness, occupies precisely the same position as any other witness, and may be examined * * * generally as to all matters which affect his credibility * * *”

“The theory upon which the latter (cross-examination) is conducted is that its primary objective is the ascertainment of truth, not by eliciting positive evidence directly bearing on the facts, but by furnishing a means of testing the truthfulness and credibility of witnesses.”

Underhill's Criminal Evidence (1935 Ed.), Sec. 400, p. 807.

We respectfully submit that it would be a strange rule of law which would permit the defendant, as a witness, to commit perjury by claiming that he was not addicted to the use of drugs and “knew nothing about them” and would deny to the Government the right to prove by cross-examination and rebuttal that while awaiting trial he had undergone treatment for narcotic addiction. This evidence certainly tested his credibility as a witness.

We also respectfully call the Court's attention to the fact that appellant did not object to these questions on cross-examination nor to the testimony of the doctor and nurse in rebuttal. He objected only to the introduction of the records (Government's Exhibits Nos. 2, 3, 4, 5, 6 and 7). If the oral testimony was admitted without objection we fail to under-

stand how the admission of the records which merely corroborated that testimony could be prejudicial.

If an objection is not made nor an exception noted any error now assigned as to it should not be considered by the Appellate Court.

Sartain v. United States, 16 F. (2d) 704;

Degnan v. United States, 271 F. 291;

O'Neil v. Vermont, 144 U.S. 323, 12 S.Ct. 693, 36 L. Ed. 450;

Rosen v. United States, 271 F. 651.

Appellant also contends that evidence showing his use of a fictitious name was improperly admitted. This might be so if the purpose of its introduction was to degrade the witness and for no other legitimate purpose. It is clear that in the instant case it was not offered for that purpose but, on the contrary, was necessary in order to identify the defendant as the person who had received treatment at the Sanitarium.

(a) Communications Between Physician and Patient Are Not Privileged in Criminal Cases.

Such communications were not privileged at common law.

Wigmore on Evidence (1940 Edition), Sec. 2380.

There is no Federal statute in point and we have been unable to find a Federal case which determines the question as a matter of Federal law as distinguished from an interpretation of a statute of some particular State.

No such privilege exists under California law in *criminal* cases. Section 1881 (subdivision 4), California Code of Civil Procedure, limits the rule to *civil actions*. Chapter II of Title X of the California Penal Code (Sections 1321-24) "Who May be Witnesses in Criminal Actions", while expressly preserving the rule as to husband and wife, is significantly silent concerning physician and patient.

People v. Lane, 101 Cal. 513, 516;

People v. West, 106 Cal. 89;

People v. Griffith, 146 Cal. 339;

People v. Warner, 117 Cal. 639.

N.B. As we are concerned here with the *absence* of a restrictive rule of evidence we need not consider the problem presented by *United States v. Reid*, 12 How. 361, 363, 13 L. Ed. 1023; *Logan v. United States*, 144 U.S. 263, 36 L. Ed. 429 and *Rosen v. United States*, 245 U.S. 467, 62 L. Ed. 406, as to whether the State or the Federal rule shall apply. It would be otherwise if we were relying upon a permissive rule of evidence of a State.

IV. EXTRAJUDICIAL STATEMENTS PROPERLY ADMITTED.

First: Confession of Appellant's Wife.

The appellant's wife, who was also a defendant in the case, has not appealed. We are not aware of any theory of law which would permit the appellant to attack, in this appeal, the admissibility of his wife's confession. In any event, all of the grounds advanced in support of the admissibility of the appellant's con-

fessions apply with equal force and effect to those of his wife.

Second: Confessions Not Admitted as Part of the Res Gestae.

The appellant's statements to the Officers clearly amounted to confessions.

“A ‘confession’ is a declaration made by the accused admitting his participation in the crime with which he is charged and is a direct acknowledgment of guilt.”

Gulotta v. United States, 113 F. (2d) 683.

They were admitted in evidence as such and not as “spontaneous utterances while under the influence of the transaction”. Hence, the principles of law pertaining to *res gestae*, relied upon by the appellant, do not apply.

Busch v. United States, 52 F. (2d) 79, certiorari denied in *Greible v. United States*, 284 U.S. 687, 52 S.Ct. 209, 76 L. Ed. 580.

Third: Confessions Admitted in Violation of Constitutional Rights.

Because of the broad statement in Appellant's Brief, that his confessions were admitted in violation of his “constitutional rights”, it is not clear whether he relies upon the ground that the confessions were inadmissible because involuntarily made or upon the more specific ground (as his citations would indicate), that they were inadmissible because made after the arrest and before he was brought before a committing

magistrate. In order that the matter may be considered fully, we will discuss both phases of the problem.

(a) The Confessions Were Voluntarily Made.

A confession is presumed to be free and voluntary.

Ah Fook Chang v. United States, 91 F. (2d) 805;

Murphy v. United States, 285 F. 801, certiorari denied, 261 U.S. 617, 43 S.Ct. 362, 67 L. Ed. 829.

The burden of proof that the confession is free and voluntary is not upon the Government. The confession is admissible without proof of its free and voluntary character and the burden is upon the defendant to establish that the confession was involuntary.

Hartzell v. United States, 72 F. (2d) 569, certiorari denied 293 U.S. 621, 55 S.Ct. 216, 79 L. Ed. 708;

Gray v. United States (CCA-9), 9 F. (2d) 337.

The fact that the accused was under arrest at the time of confession is not of itself sufficient to exclude the confession.

McNabb v. United States, 318 U.S. 332, 63 S. Ct. 608;

Lisbena v. California, 314 U.S. 219, 239-241;

Ziang Sun Wan v. United States, 266 U.S. 1, 14;

Sparf v. United States, *supra*.

The fact that the confession was made to a person in authority does not render it inadmissible.

Perovich v. United States, 205 U.S. 86, 27 S.Ct. 456, 51 L. Ed. 722.

Without commenting on the evidence at length, we merely call the Court's attention to the following facts: the appellant was arrested at approximately 6:45 o'clock in the evening; he was then taken immediately to his hotel room across the street; between 7 and 8 o'clock that same evening he confessed to Agent McGuire and offered to "make a deal"; upon being told that he would have to discuss this matter with Mr. Manning he requested that he be taken to him; he was taken to the office of the Federal Bureau of Narcotics; he went out to eat with the Agents and when Mr. Manning came in at 11:30 o'clock that evening he again confessed, repeating the same story that he had told to Agent McGuire.

There was not a scintilla of evidence introduced at the trial to suggest that the confessions were secured by means of duress, threats, promises, coercion, persuasion, fear, hope of leniency or improper influence.

Lisbena v. California, supra;

Ziang Sun Wan v. United States, supra;

Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L. Ed. 568;

Wilson v. United States, 162 U.S. 613, 623, 16 S.Ct. 895, 899, 40 L. Ed. 1090;

Sparf v. United States, supra;

Hopt v. Utah, supra;

McAffee v. United States, 105 F. (2d) 21, 70
App. D.C. 142;

Murphy v. United States, *supra*;

3 *Wigmore on Evidence*, 1940 Ed., Section 882.

Furthermore, the appellant denied having made the confessions; he admitted having the conversations during which the confessions were allegedly made and offered no proof that these conversations were involuntary, nor did he move to exclude the confessions. He merely objected on the grounds that they violated his constitutional rights (Tr. 69, 107), and then proceeded to offer his version of the conversations which contradicted that of the Agents and, if believed, would indicate that he had not confessed. The jury could properly determine which version was the true one, giving due weight to the credibility of witnesses.

The proper method of raising the question of the involuntary nature of a confession in the trial Court is by a motion to exclude, or at least, by some appropriate objection which will apprise the Court that this point is raised and enable the Court to conduct a hearing in the absence of the jury to determine the substantiality of the motion or objection.

McNabb v. United States, *supra*;

Tooisgah v. United States, 137 F. (2d) 713;

Mangum v. United States (CCA-9), 289 F. 213;

Rossi v. United States (CCA-9), 278 F. 349.

We respectfully submit that when this procedure is not followed and the appellant does not claim that the circumstances under which the confession was

made show it to have been involuntary but, on the contrary, testifies to the conversation but denies the confession, he should not be permitted to raise the point for the first time on appeal.

The testimony concerning the circumstances under which the confessions were made does not show them to be “inherently coercive” so as to bring them within the rule of

Ashcraft v. Tennessee, 322 U.S. 143.

Nor, in view of the discussion of *McNabb v. United States*, supra, is there a “plain error” so as to bring it within the rule announced by this Honorable Court in

Gros v. United States, 136 F. (2d) 879.

(b) The Doctrine of the “McNabb Case” Not Applicable.

Appellant relies upon *McNabb v. United States*, supra (and, we presume, upon *Anderson v. United States*, 318 U.S. 350, 63 S.Ct. 599, 87 L. Ed.), as authority for the broad proposition that “statements and admissions taken from a defendant before he has been brought before a committing magistrate as required by the statute are not admissible in evidence at the trial”. In other words, that *any* confession in a federal case, whether voluntary or not, is *ipso facto* inadmissible in evidence if made between the time of arrest and appearance before a committing magistrate, however short.

Appellant contends that it is an absolute rule by which every confession, regardless of its truth or falsity, regardless of the circumstances under which

it was secured, regardless of its voluntary nature, must be excluded unless, prior to the time it was given, a defendant has been arraigned before a committing magistrate. In other words, arraignment is a *sine qua non*.

We respectfully submit that this is not the doctrine of the *McNabb* and *Anderson* decisions. These two cases have been followed in the following cases:

Runnels v. United States (CCA-9), 138 Fed. (2d) 346;
United States v. Haupt, 136 Fed. (2d) 661;
Gros v. United States (CCA-9), *supra*.

The distinction between these cases and the instant case is clear: In the *McNabb* case two of the defendants were put in a barren cell and kept there for fourteen hours. For two days they were subjected to unremitting questioning by numerous officers. One defendant was questioned continuously for five or six hours. In the *Gros* case the defendant was confined for five days; in the *Haupt* case for several weeks; in the *Runnels* case for seventeen days. The confessions were obtained during these varying periods and before the defendants were taken before a committing magistrate.

In our opinion, the basis of the decision in the *McNabb* case is that there was illegal detention of a prisoner *coupled with aggravating circumstances*, circumstances which were deemed by the Supreme Court to be contrary to proper conduct of federal prosecutions.

This has been made clear in

United States v. Mitchell, 322 U.S. 65, which embodies a clarification of the *McNabb* case. In that case Justice Frankfurter, delivering the opinion of the Court said, at page 67:

“Inexcusable detention for the purpose of illegally extracting evidence from an accused, and the successful extraction of such inculpatory statements by continuous questioning for many hours under psychological pressure, were the decisive features in the *McNabb* case which led us to rule that a conviction on such evidence could not stand.”

There Mitchell was taken into custody at his home at 7 o'clock in the evening and taken to the police station. Within a few minutes of his arrival he admitted his guilt. He was not taken before a committing magistrate for eight days. Yet the Court said:

“Undoubtedly his detention during this period was illegal. * * * But, in any event, the illegality of Mitchell's detention does not retroactively change the circumstances under which he made the disclosures. These, we have seen, were not elicited through illegality. Their admission, therefore, would not be used by the Government of the fruits of wrongdoing by its officers. Being relevant, they could be excluded only as a punitive measure against unrelated wrongdoing by the police. Our duty in shaping rules of evidence relates to the propriety of admitting evidence. This power is not to be used as an indirect mode of disciplining misconduct.”

(At 70-71.)

See also:

United States v. Klee, 50 E. Supp. 679 at 684, where the Court said that in the *McNabb* case the Supreme Court was not "laying down a mechanical rule or creating a situation of rigidity".

The *Mitchell* case, except for the delay in being arraigned, is practically on "all fours" with the instant case. Here the appellant was arrested at 6:45 o'clock in the evening, he confessed between 7 o'clock and 8 o'clock, he went out to a restaurant with the Agents, he confessed again at 11:30 o'clock after waiting this period of time at his own request; he was then placed in the City Jail for arraignment before the United States Commissioner the next day (Tr. 75).

As the Supreme Court said in the *Mitchell* case:

"Here there was no disclosure induced by illegal detention, no evidence was obtained in the violation of any legal rights, but instead * * * the prompt acknowledgment by an accused of his guilt, and the subsequent rueing apparently of such spontaneous cooperation and confession of guilt." (at 70.)

See also:

McNabb v. United States, 142 F.(2d) 904, certiorari denied, 65 S.Ct. 114.

Fourth: Appellant's Confession Was Corroborated.

In this Circuit in order to justify a conviction, the evidence corroborating the confession need not be

such as to, independently, establish the *corpus delicti*.

Wiggins v. United States (CCA-9), 64 F.(2d) 950; certiorari denied 290 U.S. 657, 54 S.Ct. 72, 78 L. Ed. 569;

Wynkoop v. United States (CCA-9), 22 F.(2d) 799;

Pearlman v. United States (CCA-9), 10 F.(2d) 460.

In the latter case the Court (citing *Mangum v. United States* (CCA-9), 289 F. 213, 216, said (at p. 462):

“Evidence *aliunde*, however, as to the *corpus delicti*, need not be such as to alone establish the fact beyond a reasonable doubt. It is sufficient if, when considered in connection with the confession, it satisfies the jury beyond a reasonable doubt that the offense was in fact committed, and the plaintiff in error committed it.”

See also,

Gulotta v. United States, *supra*.

In

Pong Wing Quong v. United States (CCA-9), 111 F.(2d) 751,

this Honorable Court held that proof that the appellant placed a customs label on a trunk containing opium with the probable effect of preventing customs inspection was sufficient proof of the *corpus delicti* to authorize the admission of the appellant's confession.

We respectfully submit that the evidence in this case showing possession of the narcotics by the ap-

pellant's wife a few seconds after she left the automobile driven by appellant, her attempt to dispose of them upon recognizing the Agents, the fact that she stood on the street corner while appellant drove off and returned and all of the circumstances surrounding the transaction was sufficient evidence to establish the *corpus delicti* and permit the admission of appellant's confession.

Fifth: Instructions Must Be Accepted as Correct.

As no exceptions were taken to the Court's instructions, they must be accepted, on appeal, as having been correct.

Kitrell v. United States, 79 F.(2d) 259, certiorari denied, 296 U.S. 643, 56 St. Ct. 248, 80 L. Ed. 457;

Busch v. United States, *supra*.

CONCLUSION.

We respectfully submit that a reversal of this conviction would be a grave miscarriage of justice. The appellant is a man who has made use of every trick, scheme and prevarication of which his nimble mind could conceive to escape the just punishment of his crime. When he thought it was to his advantage, he confessed; when he could not "make a deal", audacious in its scope, to avoid prosecution entirely, he glibly recanted. He blandly committed perjury on the witness stand, feeling secure that it would not be discovered, when his falsity was exposed he attempted to

hide behind the technicality of privilege, although, he, himself, put his good character in issue.

For the reasons stated in our Brief we respectfully submit that the judgment should be affirmed.

Dated, San Francisco,
February 14, 1945.

Respectfully submitted,

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